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SENT VIA EMAIL (deltaplancomment@deltacouncil.ca.gov)

Ms. Terry Macaulay
Deputy Executive Officer, Strategic Planning
Delta Stewardship Council
650 Capitol Mall
Sacramento, CA 95814

Re: LAND Comments on Fifth Staff Draft Delta Plan

Dear Ms. Macaulay:

These comments are submitted on behalf of Local Agencies of the North Delta ("LAND"), which is a coalition comprised of reclamation and water districts in the northern geographic area of the Delta.¹ LAND participant Agencies have concerns about how the Delta Stewardship Plan ("Plan") may eventually impact the reliability and quality of water supplies *within* the Delta, the provision of water according to established water rights, and/or, drainage and flood control services to landowners within their respective districts, and wish to consult with the Delta Stewardship Council ("Council") on these and related issues. (Water Code, § 85300, subd. (b).) These comments are offered in an attempt to promote development of a Plan that meets statutorily mandated legacy community, sustainable agricultural, economic, environmental and other values as the Council pursues its broader co-equal goals.

While the Council has incorporated a number of comments recommended by LAND into the Plan, several comments have not been responded to in any manner. The transparent disposition of comments is critical to maintaining the effectiveness of the process moving forward. It is expected that the Council may have differences of opinion, but without response documentation, no additional facts can be provided to substantiate or refute

¹/ Current LAND participants include: Reclamation Districts 3, 150, 307, 551, 554, 755, 813, 999 and 1002. Some of these agencies provide both water delivery and drainage services, while others only provide drainage services. These districts also assist in the maintenance of the levees that provide flood protection to homes and farms.

matters. In general, the Plan has several elements that would be of significant state-wide benefit in terms of theoretically improving regional self-sufficiency, but lack the degree of specificity and detail to ultimately reach that goal. To the extent that the co-equal goals can be met, regional self-sufficiency must be a priority for ensuring that the risks of worst-case scenarios are minimized, and to reduce the disproportionate impacts on the sustainable Delta agriculture and the Legacy communities.

The Plan does have several elements which RDs support, such as RR R2 (Dredging) RR R7 (Flood Response), RR R8 (Immunity), and RR R12 (Flood Reoperations).

Chapter 1: The Delta Plan

General Comments

The Fifth Draft of the Plan continues to pursue a one-sided agenda of promoting habitat through the preclusion of other existing lawful land uses behind levees of current standards, while ignoring the negative consequences of out of basin conveyance. The requirement of reduced reliance on the Delta for export has been made a paper analysis without standards. The “paper” water use efficiency required in the Plan means little if there are no limitations on exports to maintain a sustainable level; it is not a co-equal goal if exports trump all other legal mandates. The Plan also continues to overtly reduce flexibility for existing management and capacity for *local* agricultural sustainability and water reliability. The following are unresolved items from the Fifth or earlier drafts:

- Overstatements of worst-case seismic risk as a justification for conveyance, and permanent restrictions on Delta development and agriculture;
- Severe development limits keyed off of unrealistic levee standards, even in agricultural areas, and for levee repairs;
- Preference for setback levees, without any technical justification, precluding other engineering and more cost-effective solutions, and mandating review requirements;
- Creation of an unnecessary new RD oversight entity that would assess fees and take over levee maintenance and repair funding with no local accountability;
- New water diversions for use *within the Delta* must inexplicably demonstrate the evaluation and implementation of all of other water supply alternatives even though the Delta is the local water supply;
- Failure to include incentives for sustainable agricultural practices that improve water quality and have species benefits;
- Failure to protect the sustainability of Delta Legacy towns, and agriculture, and precluding the flexibility to allow it to evolve;

- Failure to require endowments for habitat projects;
- Failure to support willing seller requirements for habitat land acquisitions;
Failure to acknowledge impacts on local communities and RDs from the Plan;
Failure to objectively assess options other than new conveyance, and to provide general guidance regarding the types of conveyance options that would meet the co-equal goals; and
- Failure to define what constitutes a covered action and to provide a clear pathway for local governments and landowners to make consistency determinations.

The Fifth Draft of the Plan continues to overstate the risk of catastrophic failures in the Delta. The continuing theme of exporting Sacramento water at any cost is not consistent with any definition of “balanced,” and fails to reduce reliance on the Delta. The continued and disingenuous conflation of higher levee risk areas with lower risk areas, and high density secondary zone development with small-scale primary zone development, may be useful for politics but not for resolving problems and developing a plan that is responsive to the actual conditions in a complex Delta.

Moreover, continued Legacy Communities and farming anywhere in the Delta is not at risk even in the event of a catastrophic failure, *if the levees are ultimately repaired*. The risk to conveyance from the same worst-case earthquake is not impaired by Delta agriculture; the local RDs are in fact the primary means of levee monitoring, repair, and cost sharing for their maintenance. It is the projects that have been free-riders on the local agriculture, not the fanciful premise being used in the Plan.

The Council’s virtually exclusive emphasis on risk reduction due to levee classification and prospective elimination of economic and community vitality, despite its mandate, should be more focused on risk reduction through accelerated levee maintenance and upgrade, as well as rapid emergency response. The purported ecosystem benefits from expanding habitat will require more levee protection and redesign, not less. More reliable water supply both for isolated and dual conveyance will require additional levees and improved levee design in the Delta.

Fundamentally, a precarious and now antiquated system has resulted from supplying the regions of the state that have over-exploited their resources and yet refuse to constrain their growth in accordance to their water supplies. The burdens of those systems now rests entirely on the Delta in the Plan, and is crystallized by the Plan’s provisions.

Again, with respect to the continued overstatement of existing risks in the Delta related to levees, we recommend that Council staff review the information provided on pages 39-71

of the Delta Protection Commission's Second Draft Delta Economic Sustainability Plan.
(Available at:
http://deltacouncil.ca.gov/sites/default/files/documents/files/ESP_Full_8.11_1.pdf.)

The Plan and policies continue to blindly promote completion of the Bay Delta Conservation Plan ("BDCP") as a panacea for the problems of the Delta. The problems of the Delta include massive out of basin water transfers to licensees, return flows from those same unsustainable operations laden with salts and toxins, upstream water storage and diversion in every watershed, urban stormwater runoff, as well as deliberate and accidental species introductions which have completely changed the ecosystem dynamics. None of these issues are addressed in any practical way by the Plan.

Again, and notwithstanding the explanation provided in Appendix A of the Fifth Draft, we still believe that the Council should assess options other than new conveyance (such as screening the existing pumping facilities) and also make general recommendations on the types of conveyance options that could meet the coequal goals. The BDCP does not have statutory responsibility for meeting the coequal goals; only the Council can provide guidance on how conveyance could be improved in the context of achieving the coequal goals "in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place." (Wat. Code, § 85054). Yet strikingly, the mechanism by which to test this balance is entirely absent as also the metrics by which it could be independently assessed and its scientific credibility ascertained, equally obvious by their absence.

As written, Plan policies and recommendations address parts of the BDCP (e.g., Chapter 5 addresses habitat creation), but do not provide any guidance on the most potentially deleterious aspects of the BDCP (e.g., new isolated conveyance). If the Council is correct that providing any policies regarding conveyance could interfere with the appellate role of the Council with respect to BDCP, then the Council should also forgo having any policies affecting habitat restoration, as that is also a major BDCP component.

Chapter 3: Governance

General Comments

We continue to be concerned with the Plan's approach to Governance in restricting the ability of local agencies to continue to provide essential services and for Delta communities to prosper. In particular, too many typical, local projects could be considered covered actions, thereby interfering with the sustainability of Delta communities and the functionality of local governments.

Specific Comments

Draft 5, p. 57: Confusion of Delta Reform Act definitions with CEQA terms of art should be avoided.

While the discussion of the relationship of covered actions to the applicability of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq. ("CEQA")) to projects within the Plan area has improved, this issue is still far from resolved.

Draft 5, p. 58: Appropriate projects should not be considered covered actions.

LAND continues to support the Council's consideration of excluding projects that local lead agencies have determined to be exempt from CEQA from the definition of a covered action. (See Pub. Resources Code, §§ 21080, subd. (b), 21080.01-21080.08, 21080.7-21080.33, 21084, subd. (a), CEQA Guidelines, § 15061, 15260-15285, 15300-15332.) Moreover, for the benefit of local planners and landowners, a list of local projects should be provided for which consistency certifications are typically not necessary. Examples of such projects include:

- Co-location of existing water intakes;
- Screening of existing water intakes;
- Second dwelling units for agriculturally zoned parcels, as permitted by the local land use jurisdiction;
- Major repairs to levees (beyond routine maintenance);
- Road and other existing infrastructure maintenance; and
- Construction of farm related buildings and agricultural product processing facilities.

While it is likely these types of actions would never rise to the level of having a significant impact on achievement of the coequal goals in the first place, it is incumbent that the Council clarifies that these types of actions would not require a certification of consistency.

Draft 5, pp. 60-61: Ecosystem and Water Management Standards are inadequate.

Under GP 1, Ecosystem and water management covered actions are held to a novel standard: "Documentation of access to adequate resources and delineated authority by the entity responsible for the implementation of the proposed adaptive management process." The ecosystem covered actions must be held to the appropriate PAR and associated endowment funding mechanisms used to protect both the Council and adjacent

landowners from the chronically under- or un-funded restoration projects and their weed management problems.

Draft 5, p. 61: Submission of Certification for Existing Plans.

It still appears that local agencies are required to submit all existing plans for certification. LAND believes that the Council should focus its efforts on consistency of covered actions going forward. Neither the Council nor local governments have the staff or resources to deal with such a consistency process for the myriad of local ordinances. If covered actions are undertaken that are not consistent with the co-equal goals, those projects would require a consistency certification in any case.

Chapter 4: Manage Water Resources

General Comments

The Fifth Draft Plan includes appropriate emphasis on improving regional self-sufficiency, which is the keystone of a sustainable water future for the state.

It is still unclear whether these policies in this chapter are appropriately applied to existing diversions in the Delta for in-Delta use. Because these uses are within the region where the water is located and are therefore regionally self-reliant, it is not clear that the same policies should apply to these diversions as are applied to other areas receiving water exported from the Delta that are not locally or regionally self-reliant. While all water users must use water reasonably, those using water within their own watershed, where it is available for further re-use, should not be subject to the same requirements as those relying on exported water. This is especially important when considering new requirements for small entities in rural areas. For example, what provision could Delta RDs have for provision of new water supply due to catastrophic events? There are limited groundwater supplies and the available instream water is proposed to be reduced by 40+ percent in the dry season by the BDCP.

Specific Comments

Draft 5, p. 84, WR R3 as amended on 9/22/11: In-Delta diversions are already regionally self-reliant.

WR R3 includes a requirement for new water diversions for use in the Delta to demonstrate the evaluation and implementation of all of other water supply alternatives. The policy objective this recommendation implements is "improved regional water self-

reliance.” It is unclear why such a demonstration would be required for new water diversions that would be used within the Delta watershed, and are therefore already consistent with regional water self-reliance. This is a further example of the Plan’s conflating the sustainable uses with the clearly unsustainable uses of water. The impacts of out of basin water transfers are obvious and significant on the downstream water users by virtue of declining water quality, reducing instream beneficial uses, and likelihood on impacts on listed species and their habitats. Yet the plan is silent on those impacts.

Draft 5, pp. 86-87: Conveyance Policies and Recommendations are Needed.

As discussed above, the Council should provide at least general direction to the BDCP and any future process on conveyance, as it does for ecosystem restoration (Chapter 5). The Plan should provide some policy direction for the development of improved conveyance that: (1) recognizes that conveyance may come in many forms (i.e., may not include an actual tunnel or canal); and (2) should not substitute one co-equal goal (restoring the Delta) for another (reliable water supply). On this second point, specific policies could include:

- Conveyance should not simply relocate environmental, species and water quality problems to new places but instead should provide improvements in conditions throughout the Delta;
- Any change in diversion point for new conveyance must not injure any legal user of water;
- Conveyance should not interfere with the ability to restore Delta ecosystems;
- A broad spectrum of conveyance options should be evaluated prior to selecting any option. Examples include continuing through Delta (and screening the current intakes) as well as a west Delta island based intake. (Note that the Council does not need to prefer any of these options but should provide leadership on the issue of at least considering these options as possible projects.)

Chapter 5: Ecosystem Restoration

General Comments

LAND continues to be concerned that ecosystem restoration be conducted in a manner that does not interfere with existing agriculture and communities in the Delta. The comments by the Council’s own scientist regarding the potential failures of restorations to meet their goals and objectives make it incumbent that these projects are completed on public lands first, demonstrate that they have beneficial effects, and then phased in

strategically to have the greatest possible effect with the smallest impact on existing uses. The self-evident failures of the existing state habitat projects to manage for listed species, manage against invasive weeds, and provide evidence of their benefits points to a significant funding gap clearly associated with the lack of a management endowment that is required of private projects. The participation of willing landowners in habitat projects is critical to the success of this proposal on any scale. Of similar importance is that any burdens from creation of habitat should be borne by the habitat projects, not neighboring landowners. (See, e.g., Land Use Policy P-3 of the LURMP, available at: <http://www.delta.ca.gov/res/docs/MP-Land%20Use.pdf>.) A similar policy should also be adopted by the Council.

Specific Comments

Draft 5, p. 117: Delta legacy communities should be treated the same as incorporated cities.

The Fifth Draft excludes existing cities and spheres of influence from the requirement to demonstrate that a covered action has avoided impacts on the habitat restoration opportunities. This exclusion should also apply to legacy communities in unincorporated areas. There is adequate land for habitat restoration without infringing on existing legacy communities and ignoring the statutory mandate.

Draft 5, p. 119: Recognition that setback levees are not feasible in many areas.

The caveat of setback levees “*where feasible*” has returned in the Fifth Draft, which accounts for the real possibility that site constraints often make setback levees infeasible. LAND appreciates this clarification in the Plan. Setback levees may have advantages in the upper watershed, but the conditions of the Delta such as tidal range often obviate any ecological benefits from these costly engineered features.

Draft 5, p. 120, ER R2: Policies regarding use of eminent domain are still needed.

The Council still needs to direct that eminent domain not be used to obtain habitat and include strong policies to coordinate with local agencies and landowners in planning and implementing habitat projects. As explained in previous comments, there is no existing statutory protection against use of eminent domain for acquisition of land for habitat creation/restoration.

The fifth bullet under ER R2 refers to development of a plan and a protocol for acquiring necessary land for ecosystem restoration. This recommendation is inadequate to address

the concerns regarding use of eminent domain for habitat projects. As explained previously, a sub-recommendation should be added to preclude use of eminent domain for habitat projects. Local Habitat Conservation Plans (“HCPs”) do not allow condemnation of land for the simple reason that these lands are already managed effectively by local residents and their support is needed to maintain the conservation benefits. Consistent with this practice, FWS has recently committed to no use of eminent domain in the Everglades Headwaters restoration project. (See <http://www.npr.org/2011/09/12/140403285/agency-takes-new-approach-to-save-everglades-land>.)

Chapter 6: Improve Water Quality

General Comments

The role of sustainable agricultural practices as a means to improve water quality still is not recognized in this Chapter. Policies applicable to all users of water that originated in the Delta should be included in the Plan.

As explained in previous comments, the co-equal goals cannot be met without a concerted and implementable sustainability strategy. The Plan should include policies to promote these and other sustainable practices in the Delta, upstream of the Delta, *as well as in areas that rely on water exported from the Delta*. Most importantly, this chapter ignores the issue that transfers of water from the Sacramento River, upstream of most of the Delta, will have immediate and significant effects on water quality, water levels, and habitat.

Chapter 7: Reduce Delta Flood Risk to People, Property, and State Interests

General Comments

The Fifth Draft Plan continues to include numerous policies to restrict sustainable development and agricultural flexibility within the Delta, with the ostensible goal of reducing risks. However, as explained by LAND as well as other local governments previously, development within the Delta is already severely limited by existing state and local requirements. Moreover, there are many more effective means to reduce risk than preventing quite minimal agriculturally-related development needed to ensure the sustainability of the region.

The overall emphasis on economic values derided by the Council, although still in the Plan, points to unarticulated but strongly held assumptions. To date, in its most simple form, the analysis used by the Department of Water Resources for levee funding assesses

the number or people impacted, the relative replacement value, and the degree of inundation. That calculus, with some other values, provide the basis for a risk assessment. The Council has pointed to calculating risk based on the degree of potential impact on the Projects' ability to transfer water out of the Delta. That proposed "risk analysis" is no way protective of habitat, Delta agriculture, or legacy communities. This, again, conflates all of "state interests" into subsidizing unsustainable agriculture and growth inducing policies at the peril of the other "co-equal goal" and the other legal provisions.

Specific Comments

Draft 5, p. 167, Figure 7-3

LAND continues to object to inclusion of this figure in the Plan. It presents an unrealistic and worst case picture of the risks associated with levee failures. Moreover, even if the figure is reliable, further study directed by the same authors indicates that the Delta would flush and restore its freshwater character in a relatively short time period. This is an important factor to consider in the context of assessing risks to water supply posed by earthquakes.

Draft 5, p. 173, RR P3: Policies regarding levee classifications should take into account existing land uses and the feasibility of major levee upgrades.

While the revised table is somewhat improved, there are still many questions about how it would work in practice. In particular, the table appears to include activities that are not covered actions. While LAND appreciates the clarification that agriculture may occur within Class 1 levees, for instance, ongoing agriculture or even a new agricultural operation would and should not be a covered action.

As explained previously, agricultural zoning in the Primary Zone of the Delta generally allows for a second home to be built on the same parcel. Such second homes are helpful in maintaining multi-generational family farms. Table 7-1 should clarify the type of development that would also be a covered action subject to regulation. It should also state that second homes not otherwise considered covered actions would clearly not be subject to the restrictions in Table 7-1.

With respect to the timing of implementation of RR P3, it would appear reasonable to provide a reasonable amount of time for covered actions to come into conformance with the final version of Table 7-1. It is unclear why actions within Class 5 levees would have until 2025 to comply while actions within other types of levees would have no time to

comply. These timelines should be the same. Again, due to the complexity of these issues and the need for close consultation with local governments with land use jurisdiction over the Delta, it is recommended that development of appropriate restrictions for development constituting covered actions be addressed in a focus or work group.

Draft 5, p. 173, RR R4: It is not feasible for all actions on the on the land side of the levee to demonstrate adequate area for a setback levee pending further guidance in the future.

This recommendation does not have any cited scientific justification. It is also onerous and unreasonable in terms of economic impact and implementation. Implementation of this recommendation would interfere with ongoing activities in the Delta that are essential to protecting and enhancing the regional agricultural values. This requirement as written remains unnecessary and not reasonably implemented.

Draft 5, p. 178, RR R5: Investment priorities should not be designed to foreclose investment in locally important levee systems.

While the amended version of RR R5 now delegates prioritization of levee investments to the Department of Water Resources, there is still no recognition of the need for maintenance of levees to protect and enhance agricultural values and protect legacy communities. This recommendation should acknowledge the need to also prioritize flood protection for such ongoing uses.

Draft 5, p. 182, RR R10 (formerly RR R7): Any new Flood Control District should not detract from funding of existing districts with flood control and related responsibilities.

It is still not clear that a new entity with taxation powers is necessary and/or would not be duplicative of functions already being carried out by local reclamation districts. From the local agency perspective, the primary improvement in the process would come from better coordination between the existing participants and streamlining of documentation requirements and not creation of a new layer of bureaucracy. While LAND appreciates the addition of the reference to cooperation with existing reclamation districts, this should be a requirement, not merely a suggestion.

Chapter 8: Protect and Enhance the Unique Cultural, Recreational, Natural Resources, and Agricultural Values of the California Delta as an Evolving Place

General Comments

LAND also continues to request that the Council work with Local Agencies to promote special agricultural districts to protect and enhance Delta agriculture. Conferring with the Delta County Agricultural commissioners for recommendations regarding policies that would promote the Delta's agricultural values would also be helpful.

Chapter 8 should be informed by the significant efforts of the Delta Protection Commission, which has analyzed and provided the following conclusions in its August 9, 2011 proposal in its Executive Summary (pp. xiii-xvi), including the following Recommended Actions for Economic Sustainability:

- Improve core, non-project Delta levees to the PL 84-99 standard by 2015 using the existing Delta levee subventions and special project programs.
- Improve many Delta Levees beyond the PL 84-99 that addresses earthquake and sea-level rise risks, improve flood fighting and emergency response, and allow for vegetation on the water side of levees to improve habitat.
- Maintain or enhance the value of Delta agriculture.
- Initiate a process to streamline local, State, and federal regulations and permitting.
- The Delta Stewardship Council should not increase regulation of "covered actions" for industries it is trying to enhance in the Delta.
- An existing agency should be designated to manage and implement economic sustainability efforts in the Delta.
- Create a Delta and/or Legacy Communities "brand" to enhance awareness.
- The Delta Investment Fund should be established and used strategically to implement the recreation and tourism enhancement strategies.
- Develop measurable targets for recreation and tourism and agricultural sustainability, and track performance over time.
- Create flood bypass and habitat improvements in the Yolo bypass, McCormack-Williamson Tract, and the lower San Joaquin River near Paradise Cut.
- Improve water quality and freshwater outflow in the Delta.

We also agree with the DPC regarding the actions that are not recommended because they significantly conflict with economic sustainability:

- A 15,000 cubic feet per second isolated water conveyance facility is inconsistent with economic sustainability.
- A large area of open water in the Central Delta caused by the permanent flooding of several contiguous islands is inconsistent with economic sustainability.

The Delta Protection Commission's efforts should not be dismissed away as inconsistent with a Plan that has not been thoroughly or equitably developed, and which was supposed to reflect the whole host of underlying analyses.

Chapter 9: Finance Plan to Support Coequal Goals

Draft 5, p. 210, FP R1: Economic burdens are too heavy on local RDs.

The economic burden of maintaining the levee infrastructure for protecting these facilities falls on the RDs, so any fee imposed should be provided to the local RDs on a specified share, at a minimum 50%.

Draft 5, p. 211, FP R6: The recommendation lacks specific detail or description to adequately assess its utility.

A new fee without a consequential clearly defined benefit does not seem reasonable.

Draft 5, p. 212, FP R12: The Council should require payment of in-lieu taxes for Delta Plan consistency.

The Council should include a policy requiring payment of in-lieu taxes for an action to be determined consistent with the Delta Plan. Such payments are essential to protecting and enhancing the unique cultural, recreational, natural resources, and agricultural resources of the Delta as an evolving place.

Draft 5, p. 206: Guiding Principles should include Stressors on Fish

The third bullet in this list refers to a "stressor pays" principle. While the reference to urban pesticides (and other contaminants) is appropriate, *this bullet should also refer to stressors on fish caused by reduced flows as well as entrainment and entrapment in major*

Ms. Terry Macaulay
September 30, 2011
Page 14

water diversion facilities. This stressor has been recognized by the state and federal courts with respect to CVP's and SWP's south Delta facilities, and would occur as a result of construction of new diversion facilities in the north Delta.

The sixth bullet refers to targeted finance plans for "major" Delta Plan activities. Targeted plans should also be prepared to finance protecting and enhancing the unique cultural, recreational, natural resources, and agricultural resources of the Delta as an evolving place.

* * *

Thank you for considering these comments on the Fifth Draft of the Plan. LAND would be pleased to discuss the specifics of our written and verbal comments and concerns with the Council's staff at their convenience. We look forward to continued collaboration with the Council and staff, including participation in focus or work groups, as the Plan progresses.

Very truly yours,

SOLURI MESERVE
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By:


Osha R. Meserve

ORM/mre

cc: Steering Committee, Local Agencies of the North Delta